

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NICK MILETAK,

Plaintiff,

v.

AT&T SERVICES, INC.,

Defendant.

Case No. [17-cv-00767-EMC](#)

**ORDER DENYING PLAINTIFF'S  
MOTION TO REMAND, AND  
GRANTING DEFENDANT'S MOTION  
TO DISMISS**

Docket Nos. 12, 15, 30

**I. INTRODUCTION**

Pro se Plaintiff Nick Miletak filed the present action in state court seeking to void a prior settlement agreement which, he contends, is void under Cal. Bus. & Prof. Code § 16600 as contrary to public policy. Docket No. 1 Ex. A ("Compl."). Defendant AT&T Services, Inc. removed the action to this Court and now moves to dismiss the case on the ground that Miletak's claim is barred by res judicata. Docket No. 12 ("Motion"). Miletak has moved to remand the case to state Court. The Court **DENIES** Miletak's motion to remand and **GRANTS** AT&T's motion to dismiss.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

Miletak filed his initial action against AT&T, his employer at the time, in 2012 alleging state law claims for retaliation.<sup>1</sup> *See generally Miletak v. AT&T Servs., Inc.*, C-12-5326-EMC.<sup>2</sup> In April 2013, Miletak and AT&T reached a settlement agreement that provided, in relevant part, that

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<sup>1</sup> Because Miletak's complaint omits much of the relevant background, the following facts are drawn from AT&T's motion to dismiss. In his opposition, Miletak acknowledges that the facts as set out by AT&T are "substantially accurate." Docket No. 31.

<sup>2</sup> Entries in the docket for this earlier case are cited as "2012 Docket."

1 Miletak would resign from his employment with AT&T and would be ineligible for reemployment  
2 with AT&T or related entities. Motion at 3. Based on the parties' settlement, the Court dismissed  
3 the action. 2012 Docket No. 21.

4 In June 2015, Miletak filed a Motion to Set Aside the Settlement Agreement pursuant to  
5 Federal Rule of Civil Procedure 60. 2012 Docket No. 25. Miletak argued that his former counsel  
6 had falsely represented that he had malpractice insurance, and then continued to negotiate the  
7 settlement agreement after Miletak had asked him to sign a substitution of counsel form. This,  
8 Miletak maintained, constituted "fraud on the court" justifying the vacatur of the settlement. *Id.* at  
9 1. The Court denied the motion, holding that it was both untimely and substantively meritless.  
10 Docket No. 37. Miletak then filed a request for reconsideration, which the Court denied. Docket  
11 No. 42. In so doing, the Court warned Miletak against filing improper motions for  
12 reconsideration, and noted that after two meritless filings, "[s]hould Miletak again file a motion  
13 for reconsideration or other request for relief that this Court deems meritless, the Court will  
14 seriously consider the imposition of appropriate monetary sanctions." *Id.* at 2.

15 Miletak next filed a Notice of Appeal before the Ninth Circuit. 2012 Docket No. 43. He  
16 also sought appointment of counsel and leave to proceed in forma pauperis from this Court. 2012  
17 Docket No. 45. This Court found that Miletak's motion to proceed in forma pauperis was  
18 meritless because "any appeal would be frivolous and not taken in good faith." 2012 Docket No.  
19 47. The Ninth Circuit likewise denied Miletak's motion to proceed in forma pauperis on the  
20 ground that his appeal was frivolous, and after Miletak failed to pay the filing fees, the Ninth  
21 Circuit dismissed the appeal.

22 In December 2016, Miletak, acting pro se, filed the present Complaint in the Santa Clara  
23 County Superior Court alleging a violation of Business & Professions Code section 16600. AT&T  
24 removed the action to this Court on the basis of diversity on February 16, 2017.

### 25 **III. DISCUSSION**

#### 26 **A. Motion to Remand**

27 Miletak's motion to remand is not based on any substantive objection to this Court's  
28 jurisdiction; he nowhere disputes that complete diversity exists between the parties, or that the

1 mount in controversy is satisfied. Miletak instead maintains that AT&T failed to comply with the  
2 requirement in 28 U.S.C. § 1446(b) that a notice of removal be filed within 30 days of the service  
3 of the complaint. Docket No. 15 (“Remand Motion”). Miletak states that after filing the  
4 complaint on December 8, 2016, he mailed the complaint to AT&T’s California agent for service  
5 of process on December 14. Remand Motion at 3. On December 28, counsel for AT&T notified  
6 Miletak that the service packet had been received, but that it did not contain the Notice and  
7 Acknowledgement required by California law. *Id.* at 4. Miletak sent the additional forms the next  
8 day. On January 18, 2017, AT&T signed and returned the Notice and Acknowledgement forms.  
9 Docket No. 26 (“Remand Opp.”). Less than 30 days after that date, on February 16, AT&T filed  
10 its notice of removal.

11 Miletak argues that because he “substantially complied” with the statutory requirements  
12 for service by mail when first sent the complaint on December 14, the clock for AT&T to remove  
13 the case began running no later than December 28, the date on which AT&T acknowledged that it  
14 had received the complaint but notified Miletak of the deficiency in his service. But the Supreme  
15 Court has held that the time period for removal only begins to run upon the completion of “formal  
16 process.” *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 356 (1999). The fact that a  
17 defendant may already have received the complaint through less formal means is immaterial. *Id.*  
18 Miletak’s purported “substantial compliance” did not constitute formal process under the relevant  
19 state statute.

20 California law outlines the required procedures for service by mail on an in-state recipient.<sup>3</sup>  
21 *See* Cal. Civ. Proc. Code § 415.30. Specifically, the statute requires that a “copy of the summons  
22 and of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person  
23 to be served, together with two copies of the notice and acknowledgment provided for in  
24 subdivision (b) and a return envelope, postage prepaid, addressed to the sender.” *Id.* § 415.30(a).

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26 <sup>3</sup> Although the Defendant is not a California resident, the relevant recipient for determining which  
27 service of process rules apply is a corporation’s agent for service of process. *Tandy Corp. v.*  
28 *Superior Court*, 117 Cal. App. 3d 911, 913 (1981). Here, that agent was located in California.  
Miletak also appears to acknowledge that the in-state service statute, § 415.30, is the relevant  
statute. *See* Remand Motion at 4 (citing § 415.30).

1 Significantly, service under this provision is “deemed complete” only when the “written  
2 acknowledgment of receipt of summons is executed.” *Id.* § 415.30(d).

3 In this case, therefore, Miletak had not formally served AT&T until January 18, 2017,  
4 when AT&T signed and returned the Notice and Acknowledgement forms.. That is the date,  
5 therefore, on which the removal clock began to run. Under *Murphy Bros.*, the fact that AT&T had  
6 already actually received Miletak’s complaint is irrelevant; what matters is the date of formal  
7 completion of service. As AT&T notes, numerous courts have reached the same result in virtually  
8 identical circumstances. *See, e.g., Campbell v. Nationwide Mut. Ins. Co.*, No.  
9 SACV1491JLSDFMX, 2014 WL 12579812, at \*1 (C.D. Cal. Apr. 21, 2014); *Lerma v. URS Fed.*  
10 *Support Servs.*, No. 1:11-CV-00536-LJO, 2011 WL 2493764, at \*5 (E.D. Cal. June 22, 2011).  
11 Miletak offers no response to this argument, as he never filed a reply brief. Thus, because AT&T  
12 timely filed its notice of removal, the Court **DENIES** Miletak’s motion to remand.

13 B. Motion to Dismiss

14 AT&T moves to dismiss on the ground that Miletak’s claims are barred by res judicata.<sup>4</sup>  
15 As an initial matter, the Court must resolve a choice of law question. Miletak cites a number of  
16 state authorities on the law of res judicata. It is true that a “federal court sitting in diversity must  
17 apply the *res judicata* law of the state in which it sits.” *Costantini v. Trans World Airlines*, 681  
18 F.2d 1199, 1201 (9th Cir. 1982) (citing *Gramm v. Lincoln*, 257 F.2d 250, 25 n.6 (9th Cir. 1958)).  
19 However, as the Ninth Circuit has recognized, “California law . . . determines the res judicata  
20 effect of a prior federal court judgment by applying federal standards.” *Costantini v. Trans World*

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22 <sup>4</sup> AT&T requests that the Court take judicial notice of various documents related to Miletak’s prior  
23 action, including (1) the 2012 complaint; (2) the motion to set aside the settlement agreement; (3)  
24 the Court’s order denying that motion; (4) the Court’s order denying reconsideration; (5) the  
25 Court’s order denying Miletak’s motion to proceed in forma pauperis; and (6) the Ninth Circuit’s  
26 Orders disposing of Miletak’s appeal. Docket No 13. “The court may judicially notice a fact that  
27 is not subject to reasonable dispute because it: (1) is generally known within the trial court’s  
28 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose  
accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Because Defendants’  
documents are matters of public record, they fall within both of these categories. Accordingly, the  
Court grants the request for judicial notice. The Court will therefore consider these documents in  
ruling on the instant motion. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“A  
court may . . . consider certain materials – documents attached to the complaint, documents  
incorporated by reference in the complaint, or matters of judicial notice – without converting the  
motion to dismiss into a motion for summary judgment.”).

1 *Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982) (citing *Younger v. Jensen*, 26 Cal.3d 397, 411  
2 (1980); *Levy v. Cohen*, 19 Cal.3d 165, 172-73 (1977)). Because AT&T argues that Miletak's  
3 claim is barred by a prior *federal* court judgment, namely this Court's order denying Miletak's  
4 Rule 60 motion to set aside his settlement agreement, the Court must, under California law, apply  
5 the federal law of res judicata.

6 According to federal law, "[r]es judicata applies when 'the earlier suit . . . (1) involved the  
7 same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3)  
8 involved identical parties or privies.'" *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987  
9 (9th Cir. 2005) (quoting *Sidhu v. Flecto Co.*, 279 F.3d 896, 900 (9th Cir.2002)). As AT&T  
10 argues, each of these requirements is met in the present case.

11 Whether two actions involve the same claim is determined by looking at four criteria: "(1)  
12 whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or  
13 interests established in the prior judgment would be destroyed or impaired by prosecution of the  
14 second action; (3) whether the two suits involve infringement of the same right; and (4) whether  
15 substantially the same evidence is presented in the two actions." *Mpoyo*, 430 F.3d at 987. Under  
16 these criteria, the present action involves the same claim as Miletak's prior effort to set aside the  
17 settlement agreement. First, the two suits plainly arise out of the same transactional nucleus of  
18 facts, namely the settlement agreement entered into during the prior litigation. Second, it is also  
19 apparent that AT&T's rights established by the settlement agreement would be destroyed if the  
20 Court granted Miletak's requested relief. Third, Miletak asserts the same "right" that he did  
21 previously, claiming that he should not be bound by the settlement agreement. It is true that  
22 Miletak now asserts a new legal theory, but that is of no consequence, because "[r]es judicata  
23 applies not only to those claims actually litigated in the first action but also to those which might  
24 have been litigated as part of that cause of action." *Cinquini v. Donohoe*, No. C 95-4168 FMS,  
25 1996 WL 79822, at \*5 (N.D. Cal. Feb. 8, 1996). Miletak offers no reason why he could not have  
26 raised his present challenge to the settlement agreement at the time of his first motion. Finally,  
27 because both this action and the prior one were focused on the factual circumstances surrounding  
28 the negotiation of the settlement agreement, the evidence would significantly overlap between the

1 two actions.

2 With respect to the second prong, numerous courts, including this one, have held that an  
3 order denying a Rule 60 motion satisfies the “final judgment” requirement for res judicata. *See,*  
4 *e.g., Cinquini v. Donohoe*, No. C 95-4168 FMS, 1996 WL 79822, at \*5 (N.D. Cal. Feb. 8, 1996).  
5 Here, the Courts orders denying Miletak’s Rule 60 motion and his motion for reconsideration  
6 constituted final judgment on the question whether the settlement agreement should be set aside.  
7 Indeed, the Court cautioned Miletak against filing further challenges. Res judicata should  
8 therefore bar Miletak from attempting once more to seek the same relief.

9 Finally, with respect to the third prong, the two actions involve precisely the same parties.  
10 All of the requirements for the application of res judicata are therefore satisfied.

11 Miletak’s counterarguments are unavailing. First, Miletak contends that there was no final  
12 judgment in the prior action, because the Court never rendered a judgment on the merits of his  
13 underlying employment claim. Docket No. 31 (“Opp.”) at 3. That misunderstands the relevant  
14 question; the Court did, as explained above, render a final judgment on the question Miletak now  
15 seeks to litigate: *i.e.*, whether the settlement agreement should be set aside (not the adjudication of  
16 the underlying claims). Second, Miletak argues that the parties are not identical in the two actions  
17 because during the previous action he was acting on behalf of his union. *Id.* The basis for this  
18 assertion is that the retaliation at issue in the previous action allegedly occurred after Miletak filed  
19 an OSHA complaint in his capacity as a union steward. Accordingly, Miletak suggests that he  
20 was effectively representing the union in the prior action. But as Miletak acknowledges, he filed  
21 that suit in his own capacity after his union declined to escalate his grievance. This argument  
22 therefore fails. Third, Miletak argues that new facts have arisen since the prior action that change  
23 the parties’ legal rights and thus make res judicata inapplicable. But the only fact Miletak points  
24 to is the fact that he applied for, and was denied, a position at an AT&T retail store in September  
25 or October of 2015, shortly after this Court denied his motion for reconsideration. The fact that  
26 AT&T acted in accordance with the terms of the settlement agreement does not constitute a new  
27 fact that warrants reexamination of the validity of the settlement agreement, a matter previously  
28 raised.

1 Lastly, Miletak suggests res judicata should not bar his claims because he only entered into  
2 the settlement agreement under duress, and because AT&T negotiated the agreement in bad faith  
3 by continuing to negotiate with his attorney after he had requested a substitution of counsel. Opp.  
4 at 5-7. These claims are simply not supported by the record. The only evidence of “duress” that  
5 Miletak points to is an email from his attorney strongly recommending that he enter into a  
6 settlement agreement in which he would receive a cash payment in exchange for leaving his  
7 employment with AT&T. But strongly worded advice from an attorney does not in any way  
8 constitute duress. And as to AT&T’s bad faith, in Miletak’s first motion to set aside the settlement  
9 agreement, he went out of his way to stress that “at all times the Defendant and its counsel acted  
10 ethically and negotiated in good faith.” Docket No. 33 at 13. Moreover, Miletak does not explain  
11 why he agreed to the settlement if it was negotiated in a way that was inconsistent with his wishes.  
12 Miletak’s belated allegation of bad faith appears to be nothing more than a last-ditch effort to  
13 defeat res judicata. In any event, these are claims that could have been brought in his earlier  
14 attempt to overturn the settlement agreement. Thus res judicata bars these claims.

15 In sum, all of the elements for res judicata are met here, and Miletak's arguments to the  
16 contrary are unavailing. Moreover, because Miletak's claims are barred, any amendment of his  
17 complaint would be futile. The Court therefore **GRANTS** AT&T's motion to dismiss with  
18 prejudice.

19 **IV. CONCLUSION**

For the foregoing reasons, the Court **DENIES** Miletak's motion to remand and **GRANTS** AT&T's motion to dismiss with prejudice. The Clerk shall enter judgment and close the file.

22        This order disposes of Docket Nos. 12, 15, and 30.

24      **IT IS SO ORDERED.**

26	Dated: June 16, 2017
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EDWARD M. CHEN  
United States District Judge